St. John's Law Review

Volume 81
Number 1 *Volume 81, Winter 2007, Number 1*

Article 20

January 2012

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THE DWINDLING CLASS OF "DISABLED INDIVIDUALS": AN EXEMPLIFICATION OF THE AMERICANS WITH DISABILITIES ACT'S INADEQUACIES IN *D'ANGELO V. CONAGRA FOODS, INC.*

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INTRODUCTION

The Americans with Disabilities Act of 1990 ("ADA")[1] sought to eliminate discrimination in the workplace against individuals with disabilities by creating clear and consistent standards of protection for deserving employees.[2] Unfortunately, for the fifty-four million Americans living with a disability,[3] no such standard was ever created, and the courts seem perplexed as to who is included in the ADA's protected class. The statutory language Congress used in enacting the ADA has produced several significant hurdles—for what should otherwise be deserving employees—in qualifying for protection under the ADA. There has been significant disparity among federal circuits in interpreting the scope of the ADA's protection, particularly in defining "disability,"[4] rendering numerous impaired employees

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1 42 U.S.C. §§ 12101–12213 (2000); 47 U.S.C. §§ 225, 611 (2000).

2 42 U.S.C. § 12101(a)(3) (finding that discrimination against individuals with disabilities is persistent in the employment area); 42 U.S.C. § 12101(b)(1) (stating that the purpose of the Act is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities").

3 This figure was based on the 2004 National Organization on Disability/Harris Survey of Americans with Disabilities. Nat'l Org. on Disability, *Landmark Disability Survey Finds Pervasive Disadvantages*, June 25, 2004, http://www.nod.org/index.cfm?fuseaction=page.viewPage&pageID=1430&nodeID=1&FeatureID=1422&redirected=1&CFID=5011083&CFTOKEN=32367483.

4 *See* Timothy J. McFarlin, *If They Ask for a Stool . . . Recognizing Reasonable Accommodation for Employees "Regarded as" Disabled*, 49 ST. LOUIS U. L.J. 927, 928 (2005) (noting that the definition of disability has sparked a split among the federal circuits).

without an adequate remedy and depriving them of equality of opportunity and economic self-sufficiency.[5] The federal circuits' inability to reach a consensus as to the scope of the ADA's protective umbrella has bred uncertainty within the employer/employee relationship concerning what measures must be taken by an employer, if any, to accommodate a disabled employee.[6]

Recently, in *D'Angelo v. ConAgra Foods, Inc.*,[7] the Eleventh Circuit Court of Appeals concluded that individuals who are "regarded as disabled"—rather than being disabled in the actual impairment sense—are entitled to reasonable accommodations under the ADA.[8] The court, however, ultimately held that the plaintiff still failed to qualify for the ADA's protection as to her actual impairment claim, because her vertigo condition "[did] not substantially impair her ability to perform the major life function of working."[9]

As stated above, the *D'Angelo* plaintiff suffered from vertigo, alleging that she had been terminated from her job at ConAgra Foods, Inc. ("ConAgra") on the basis of this disability.[10] The

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[5] *See* Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 AM. U. L. REV. 1213, 1215 (2003) (writing that the employers were victorious in an overwhelming majority of ADA cases litigated in the late 1990s and early 2000s, mostly because the plaintiffs were unable to satisfy the definition of disability, "despite clearly possessing physical or mental impairments") (internal quotation marks omitted); *see also* 42 U.S.C. § 12101(a)(8) ("[T]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."); *Living with Disabilities in the United States: A Snapshot—Hearing Before the Subcomm. on Human Rights and Wellness of the H. Comm. on Government Reform*, 108th Cong. 114 (2004) (statement of Peter Blanck, Charles M. & Marion Kierscht Professor and Director of the Law, Health Policy & Disability Center of The University of Iowa College of Law) (testifying that the ability to accumulate assets is one component of economic self-sufficiency, and that a majority of disabled individuals are "asset poor," meaning that they have insufficient financial resources to support themselves at poverty level for three months without obtaining other means of support).

[6] *See* McFarlin, *supra* note 4, at 927 ("[T]he actual practice of implementing the ADA in the employment context . . . [has] generated considerable controversy in our nation.").

[7] 422 F.3d 1220 (11th Cir. 2005).

[8] *Id.* at 1235. An individual may fall within the scope of the ADA's protection either by having an actual disability, that is, "a physical or mental impairment that substantially limits one or more of the major life activities of such individual," or by "being regarded as having such an impairment." 42 U.S.C. § 12102(2)(A), (C).

[9] *D'Angelo*, 422 F.3d at 1239.

[10] *Id.* at 1221–22. Vertigo is a condition characterized by a "disordered

plaintiff was diagnosed with vertigo prior to her commencement of work at ConAgra, and within several months of employment began to experience symptoms while at the workplace.[11] The plaintiff informed her co-workers and supervisor that she was experiencing dizziness and nausea, attributing these feelings to her vertigo condition.[12] She also explained to her supervisor that she only experienced these symptoms when performing a task requiring her to stare continuously at a conveyor belt.[13] The plaintiff provided the plant manager with a note from her doctor stating that she suffered from a vertigo condition and should therefore avoid staring at moving objects such as conveyor belts.[14] Subsequently, the plant manager met with the Vice President of Human Resources, and they determined that there were no positions available at ConAgra that would accommodate the plaintiff's condition; she was terminated the following day.[15] ConAgra was aware that the plaintiff was positively qualified to work a number of different positions,[16] and that she only complained of dizziness and sickness when required to stare continuously at a conveyor belt—conduct which was not a necessary function of many of the positions that plaintiff was adept at working.[17]

At trial, the plaintiff made two claims: (1) that she was entitled to reasonable accommodations under the ADA because she suffered from an actual physical impairment substantially limiting her in a major life activity; and (2) that she was entitled to reasonable accommodations under the ADA because her

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state . . . in which the individual or the individual's surroundings seem to whirl dizzily." Vertigo, MedlinePlus Medical Dictionary, http://www2.merriam-webster.com/cgi-bin/mwmednlm?book=Medical&va=vertigo (last visited Feb. 3, 2007).

[11] *D'Angelo*, 422 F.3d at 1222–23. The plaintiff was diagnosed with vertigo in September of 1998 and began working for ConAgra in October of that same year. *Id.* at 1222. She made no mention of her condition to anyone until several months into her employment, when she started to experience episodes of vertigo on the job. *Id.* at 1223.

[12] *Id.* at 1223.

[13] *Id.*

[14] *Id.* One of the plaintiff's duties as product transporter was to work occasionally over the spreader belt. *Id.*

[15] *Id.*

[16] *Id.* at 1222–23. The plaintiff had experience working as a "spreader," "packer," "stacker," and "product transporter," as well as being qualified for several other positions. *Id.* at 1222.

[17] *Id.* at 1222–23.

employer regarded her as having such an impairment.[18] The district court granted summary judgment for ConAgra on both issues. On appeal, the Eleventh Circuit rejected the plaintiff's first contention, affirming summary judgment for ConAgra on her actual impairment claim.[19] The court reasoned that, because the plaintiff failed to show that she was substantially limited in the major life activity of working, she was not disabled in the actual impairment sense.[20] As to her "regarded as" claim, the circuit court found that genuine issues of material fact precluded finding summary judgment for ConAgra, and remanded the case back to district court.[21] In its discussion, the Eleventh Circuit reached a significant conclusion by embracing the Third Circuit's stance that individuals regarded as disabled are entitled to protection under the ADA.[22]

The dissent in *D'Angelo* viewed this as a "failure to communicate" case.[23] ConAgra was under the impression that the plaintiff's vertigo prevented her from working around any moving equipment, and thus terminated her because it believed that there was no area of the plant where she could be suitably accommodated.[24] Had ConAgra simply consulted with the plaintiff after learning of her impairment, it would have become conscious of the true extent of the limitations inherent in her condition. Working around just any moving equipment did not cause the onset of the plaintiff's vertigo; her *sole* complaint was working on the spreader belt.[25] While the dissenting judge acknowledged this significant lapse in communication, he ultimately concluded that ConAgra was justified in terminating

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[18] *Id.* at 1226.

[19] *Id.* at 1239.

[20] *Id.* at 1227. The court adhered to a standard requiring plaintiffs to show that they are unable to work in a broad class of jobs. *Id.* Since the plaintiff only argued that vertigo limited her ability to work as a product transporter, she failed to meet this standard. *Id.* Additionally, the court reasoned that the plaintiff had shown a proven ability to work, since she never experienced "full-blown vertigo where things were spinning around in circles." *Id.* (internal quotation marks omitted).

[21] *Id.* at 1240.

[22] *Id.* at 1235.

[23] *Id.* at 1240 (Fay, J., dissenting).

[24] *Id.*

[25] *Id.* at 1223 (majority opinion) (observing that "[t]he only problem for [the plaintiff] was when she had to stare at the belt '[c]ontinuously without a break' ").

the plaintiff, "based upon [its] opinion that she was not qualified to work in [its] plant."[26]

D'Angelo clearly demonstrates the hurdles that a disabled individual must overcome in order to qualify for ADA protection—hurdles that Congress did not intend to erect when it drafted the ADA.[27] While the court properly determined that "the plain language of the ADA yields no statutory basis for distinguishing among individuals who are disabled in the actual-impairment sense and those who are disabled only in the regarded-as sense,"[28] its affirmation of summary judgment for ConAgra on the actual impairment claim illustrates the inadequacies of both the ADA's language and judicial interpretation at effectively serving the statutory purpose of eliminating discrimination.[29] The overly broad language of the statute has led to inconsistent implementation of the ADA in the employment context,[30] and has deprived disabled individuals of a uniform means for obtaining proper legal recourse upon being the victims of wrongful discrimination.[31]

Part I of this Comment introduces the legislative history of the ADA, focusing particularly on its statutory purpose and judicial interpretation. Part II breaks down the various issues presented in the *D'Angelo* case and analyzes the court's decision and rationale. Part III discusses the interpretation of the ADA's "substantially limited" test, emphasizing the enormous burden

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[26] *Id.* at 1241 (Fay, J., dissenting).

[27] *See* 42 U.S.C. § 12101(b)(1) (2000) (stressing the need for a "national mandate for the elimination of discrimination against individuals with disabilities"). The legislature was clear that discrimination in employment settings is a persistent threat to equal opportunity and that it is critical that these discriminatory barriers be removed in order to provide disabled individuals with the opportunity to earn an independent living. *See id.* § 12101(a)–(b).

[28] *D'Angelo*, 422 F.3d at 1235.

[29] *See id.* at 1239; *see also* 42 U.S.C. § 12101(b)(1) ("It is the purpose of this chapter . . . to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.").

[30] *See* Hoffman, *supra* note 5, at 1218 (arguing that the broad definition of "disability" has left courts with the burdensome task of individually evaluating each plaintiff's functionality level, leading to inconsistent decisions as to which conditions constitute disabilities).

[31] *See* Michael D. Reisman, *Traveling "to the Farthest Reaches of the ADA," or Taking Aim at Employment Discrimination on the Basis of Perceived Disability?*, 26 CARDOZO L. REV. 2121, 2125 (2005) (revealing that "in 2003, ADA employment discrimination plaintiffs won only two percent of the cases filed in federal court"). Many of these plaintiffs were unsuccessful because they were unable to show that they were "disabled" under the statute. *Id.*

that it imposes on plaintiffs in establishing themselves as "disabled." Part IV examines the numerous obstacles that a plaintiff faces under the current ADA standards, and how the statute—as interpreted by the courts—heavily favors employers in cases of disability-based employment discrimination.

I. THE ENACTMENT OF THE ADA: LEGISLATIVE OPTIMISM FOR THE "ELIMINATION OF DISCRIMINATION AGAINST INDIVIDUALS WITH DISABILITIES"

A. The Statutory Purpose of the ADA and the Necessary Qualifications To Receive Protection

In 1990, Congress responded to the public outcry for increased protection for disabled individuals in the workplace by enacting the Americans with Disabilities Act of 1990.[32] The legislature made clear that the purpose of the Act was to eliminate discrimination, and to provide clear standards for doing so.[33] Its enactment was a necessary response to a growing number of disabled individuals who, at the time, lacked protection from discriminatory practices hindering their upward mobility, both socially and in the workforce.[34] Around the time

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[32] 42 U.S.C. §§ 12101–12213; 47 U.S.C. §§ 225, 611 (2000).

[33] 42 U.S.C. § 12101(b). The legislature provided that:

> It is the purpose of this chapter—
> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
> (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Id.

[34] *See* McFarlin, *supra* note 4, at 927 (recognizing that the goal of the ADA was both "noble" and "necessary"). Included in the ADA are a number of findings by Congress regarding the then-current issues concerning disabled individuals. These findings clearly evidenced the need for some form of statutory protection for the disabled in order to prevent discrimination and unequal treatment. 42 U.S.C. § 12101(a) provides:

> The Congress finds that—
> (1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is

when the ADA was enacted, approximately two-thirds of all disabled Americans between the ages of sixteen and sixty-four were unemployed,[35] and two-thirds of those unemployed, disabled persons sought work.[36] There was a critical need for a clear and comprehensive statute aimed at eliminating discriminatory employment practices. Unfortunately, that goal was hardly attained by the ADA. The Act's broad and often confusing language has produced a substantial amount of litigation, with conflicting results among courts.[37]

The general rule laid out in Title I of the ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[38] The ADA offers three definitions for

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growing older;
(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
(3) discrimination against individuals with disabilities persists in such critical areas as employment, . . . and access to public services;
(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;
. . . .
(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and
(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

Id.

[35] BERNARD D. REAMS, JR., PETER J. MCGOVERN & JON S. SCHULTZ, DISABILITY LAW IN THE UNITED STATES: A LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT OF 1990, PUBLIC LAW 101-336, at 9 (1992).

[36] *Id.*

[37] *See* McFarlin, *supra* note 4, at 927–28 ("[T]he actual practice of implementing the ADA in the employment context, and the resulting litigation, have generated considerable controversy in our nation. . . . Much of this debate has sprung out of the differing interpretations given to the ADA's often ambiguously broad statutory language.").

[38] 42 U.S.C. § 12112(a).

the term "disability," and an individual who falls within any one of the three definitions may be afforded protection. According to the statute, disability may be defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such impairment; or (C) being regarded as having such an impairment."[39] The statute further attempts to clarify the general rule by defining a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[40] The statute was unclear as to what it considered a "major life activit[y];"[41] however, the ADA has been consistently interpreted as to include working as one such activity.[42]

Congress was certainly intent on eliminating employment discrimination against the disabled, but judicial interpretation of the ADA demonstrates that this objective was in no way accomplished.[43] Astoundingly, "in 2003, ADA employment discrimination plaintiffs won only two percent of the cases filed in federal court."[44] Congress's aim was clear with its enactment of the ADA, but, in effect, the legislature shifted the burden of

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[39] *Id.* § 12102(2).

[40] *Id.* § 12111(8).

[41] *Id.* § 12102(2)(A).

[42] *See, e.g.*, Carruthers v. BSA Adver., Inc., 357 F.3d 1213, 1216 (11th Cir. 2004) (noting that the regulations implementing the ADA include "working" as a "major life activity"); *see also* Michael Faillace, *Title I of the Americans with Disabilities Act: Statutory Requirements, Legislative History, Regulations, Technical Assistance Manual, Relevant Case Law Under the ADA & 1973 Rehabilitation Act and Practical Recommendations*, *in* 730 PLI/LIT 947, 957 (2005) ("Major life activities are the basic activities that the average person can perform with little or no difficulty; e.g., caring for one's self, performing manual tasks, . . . learning and *working*.") (emphasis added).

[43] *See* Reisman, *supra* note 31, at 2122 (revealing that "an individual suffering from a medically recognized, biologically-based impairment . . . . would most likely fail in the federal courts because of the ADA's 'restrictive definition of disability' ").

[44] *Id.* at 2125 (referencing a survey conducted by the ABA Commission on Mental and Physical Disability). The survey covered 304 case decisions from 2003 involving employment discrimination claims under the ADA. Of the 304 cases, 213 resulted in victories for the employer, a mere six resulted in victories for the employee, and the merits of the claim were not resolved in eighty-five. The study inexorably concluded that this overwhelming percentage of employer victories "indicates that the procedural and technical requirements contained in the ADA, as interpreted by the courts, still create obstacles for plaintiffs to overcome." Amy L. Allbright, *2003 Employment Decisions Under the ADA Title I—Survey Update*, 28 MENTAL & PHYSICAL DISABILITY L. REP. 319, 319–20 (2004).

eliminating discrimination onto the courts by filling the statute with overly broad language. The judiciary's consistent trend of construing the ADA in favor of employers has since indicated its unwillingness to meet Congress's goals.[45]

II. THE ELEVENTH CIRCUIT'S DECISION IN *D'ANGELO* ILLUMINATED THE DIFFICULTIES PRESENTED TO COURTS IN INTERPRETING THE ADA

The text of the ADA explicitly includes individuals regarded as disabled within the statutory definition of "disability." However, prior to *D'Angelo*, only one of the six circuits presented with the issue of whether an individual regarded as disabled should be afforded statutory protection responded in the affirmative.[46] Such decisions have made it increasingly difficult for aggrieved parties to fall within the ADA's provisions. *D'Angelo* embodied an opportunity for the Eleventh Circuit to diverge from the steady trend of employer victories in ADA employment discrimination cases, and to construe correctly the ADA in a light more favorable to disabled employees.

The plaintiff in *D'Angelo* argued that she was disabled in two senses: (1) she had an actual physical impairment that substantially limited her in the major life activity of working; and (2) she was regarded as having such an impairment by her employer.[47] The district court rejected both claims and granted summary judgment for the employer ConAgra.[48] On appeal, the Eleventh Circuit was asked to make three key determinations, only two of which are relevant for the purposes of this Comment. First, the plaintiff asked the court to decide whether the ADA "require[s] employers to make reasonable accommodations for individuals regarded as disabled."[49] Second, the plaintiff petitioned the Eleventh Circuit to answer whether the district court was correct in holding that "she was not a qualified individual able to perform her essential job functions."[50] The following subsections analyze the rulings as to each of these

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[45] *See* Allbright, *supra* note 44, at 319–20.

[46] *See infra* notes 55–61 and accompanying text.

[47] D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1226 (11th Cir. 2005). The two senses of disability alleged by the plaintiff are both covered under the ADA. 42 U.S.C. § 12102(2)(A), (C) (2000).

[48] *D'Angelo*, 422 F.3d at 1224.

[49] *Id.* at 1225.

[50] *Id.*

issues, and discuss how soundly these rulings comport with the legislative intent of the ADA.

A. *A Sizable Victory for the "Regarded As" Disabled Plaintiff*

The ADA defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual,"[51] or "being regarded as having such an impairment."[52] This means that plaintiffs who fail to satisfy the first prong of the definition may still qualify for statutory protection if they are regarded as being disabled by an employer. At least, that is what the language appears to suggest. Some courts, however, have opted to disregard this portion of the definition and to formulate their own standards for being statutorily disabled.[53]

The question of whether a plaintiff who is regarded as disabled is entitled to the ADA's reasonable accommodation requirement[54] was an issue of first impression in the Eleventh Circuit.[55] This question previously appeared before the First, Third, Fifth, Sixth, Eighth, and Ninth Circuits.[56] Of these circuits, the Fifth, Sixth, Eighth, and Ninth Circuits have all held that a plaintiff who is regarded as disabled is not entitled to reasonable accommodations as required by the ADA.[57] The First

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[51] 42 U.S.C. § 12102(2)(A).

[52] *Id.* § 12102(2)(C).

[53] *See infra* note 57 and accompanying text.

[54] The general rule set forth in the ADA states that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual . . . ." 42 U.S.C. § 12112(a). The statute continues by listing acts (or omissions) included within the term "discriminate." *Id.* § 12112(b). On this list of discriminatory acts is "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." *Id.* § 12112(b)(5)(A).

[55] *D'Angelo*, 422 F.3d at 1235.

[56] *See* Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751 (3d Cir. 2004); Kaplan v. N. Las Vegas, 323 F.3d 1226 (9th Cir. 2003); Weber v. Strippit, Inc., 186 F.3d 907 (8th Cir. 1999); Workman v. Frito-Lay, Inc., 165 F.3d 460 (6th Cir. 1999); Newberry v. E. Tex. State Univ., 161 F.3d 276 (5th Cir. 1998); Katz v. City Metal Co., 87 F.3d 26 (1st Cir. 1996).

[57] *Kaplan*, 323 F.3d at 1232–33 (reasoning that "[t]o require accommodation for those not truly disabled would compel employers to waste resources unnecessarily"); *Weber*, 186 F.3d at 916–17 (concluding that the ADA could not have intended to grant some individuals a right to reasonable accommodations based upon their employers' misperceptions, while denying such accommodations to most impaired

Circuit indirectly addressed the issue and stated—without holding—that "both the language and the policy of the [ADA] seem to us to offer protection as well to one who is not substantially disabled or even disabled at all but is wrongly perceived to be so."[58] The Third Circuit is the only court both to address directly the issue and to hold ultimately that a plaintiff who is regarded as disabled is, in fact, entitled to reasonable accommodations from his or her employer, as required by the ADA.[59] In reaching this conclusion, the Third Circuit rejected the arguments set forth by the Eighth and Ninth Circuits and determined that the plain meaning of the statute made no distinction between employees who are actually disabled and employees who are regarded as disabled.[60] Therefore, the court held, the reasonable accommodation requirement was intended to encompass individuals that an employer regards as disabled.[61]

The plaintiff in *D'Angelo* suffered from vertigo,[62] which is a condition characterized by dizziness, lightheadedness, and a loss of balance.[63] She made her condition and symptoms known to her employer on a couple of occasions.[64] The employer—with full knowledge that the plaintiff was suffering from an impairment—decided to terminate her, believing that she would not be able to perform adequately the duties of her job on account of that condition.[65] It is evident that—whether or not the plaintiff's vertigo caused her to be disabled in the actually impaired sense—

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but non-disabled employees); *Workman*, 165 F.3d at 467 (determining that a "regarded as" disabled individual is not entitled to reasonable accommodations); *Newberry*, 161 F.3d at 280 (interpreting the ADA as affording protection to "regarded as" disabled plaintiffs in only very limited cases under specific factual circumstances, none of which were present in the case at hand).

[58] *Katz*, 87 F.3d at 33.

[59] *Williams*, 380 F.3d at 774 (construing the plain meaning of the ADA as extending its reasonable accommodation requirement to employees "regarded as" disabled).

[60] *Id.* at 773–74. Both the Eighth and Ninth Circuits acknowledged that the statute makes no distinction between actually disabled and "regarded as" disabled employees, but felt that such a literal application would lead to "bizarre results." *See Weber*, 186 F.3d at 916–17; *see also Kaplan*, 323 F.3d at 1232.

[61] *See Williams*, 380 F.3d at 775 ("[T]he conclusion seems inescapable that 'regarded as' employees under the ADA are entitled to reasonable accommodation in the same way as are those who are actually disabled.").

[62] D'Angelo v. Conagra Foods, Inc., 422 F.3d 1220, 1221 (11th Cir. 2005).

[63] Alternate Names for Dizziness, MedlinePlus Medical Encyclopedia, http://www.nlm.nih.gov/medlineplus/ency/article/003093.htm (last updated May 16, 2006).

[64] *See D'Angelo*, 422 F.3d at 1222–23.

[65] *See id.* at 1223–24.

she was regarded as such by her employer and terminated solely on account of this perceived disability.[66] The district court, however, failed to rule as to whether ConAgra actually regarded the plaintiff as disabled.[67] It instead sided with the Fifth, Sixth, Eighth, and Ninth Circuits, holding that an employer is not required to provide reasonable accommodations to an employee that it regarded as disabled, but who was not disabled in the actual impairment sense. Thus, the court did not have to determine whether or not ConAgra regarded the plaintiff as disabled.[68]

On appeal, the Eleventh Circuit rejected the district court's holding that under the ADA, an employer is not required to provide reasonable accommodations to an employee that it regards as disabled, and sided with the Third Circuit.[69] In doing so, the court reasoned that "the ADA's language is unambiguous, and none of the courts to depart from its plain meaning have pointed to anything—congressional findings, legislative history, or other materials—suggesting that the so-called 'bizarre' results yielded by a faithful reading of the ADA are contrary to Congress' plainly expressed intent."[70] The Eleventh Circuit even questioned whether the "bizarre results" spoken of by the Eighth and Ninth Circuits would even be that "bizarre."[71] The Eighth Circuit had indicated that one danger of a literal reading of the statute is that a disparity would emerge among "impaired but non-disabled employees."[72] The Eleventh Circuit, however, refuted this notion by maintaining that "[t]he so-called 'regarded as' plaintiffs are *not* 'impaired but non-disabled' individuals, but rather *are disabled* within the meaning of the statute."[73] The case was ultimately remanded back to district court for a determination as to whether ConAgra regarded the plaintiff as

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[66] *See id.* at 1224.

[67] *See id.* at 1234.

[68] *See id.* at 1234–35.

[69] *See id.* at 1239 ("Like the Third Circuit, '[w]hile we do not rule out the possibility that there may be situations in which applying the reasonable accommodation requirement in favor of a 'regarded as' disabled employee would produce 'bizarre results,' we perceive no basis for an across-the-board refusal to apply the ADA in accordance with the plain meaning of its text.' " (quoting Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 774 (3d Cir. 2004)).

[70] *Id.* at 1239.

[71] *Id.*

[72] Weber v. Strippit, Inc., 186 F.3d 907, 917 (8th Cir. 1999).

[73] *D'Angelo*, 422 F.3d at 1239.

disabled.[74] Since ConAgra was fully aware of the plaintiff's impairment and terminated her because it believed that she would be unable to perform her official duties,[75] the district court should find on remand that the plaintiff was in fact "regarded as" disabled by ConAgra, and thus protected under the ADA. Given that Congress intended the ADA's protection to encompass "regarded as" disabled employees, ConAgra should be found liable in failing to provide reasonable accommodations for the plaintiff.

In holding as it did on the issue of "regarded as" plaintiffs, the Eleventh Circuit became only the second circuit court to abide by the actual statutory language of the ADA. This is very disconcerting, given that a judge's duty is to interpret the law as written, and not to invent it. While the Third and Eleventh Circuits were careful not to overstep their bounds, the Fifth, Sixth, Eighth, and Ninth Circuits took it upon themselves to construe the ADA in a way clearly contrary to its plain meaning. In fact, the Eighth and Ninth Circuits even conceded that the text of the ADA made no distinction between actual and "regarded as" disabled employees.[76] Yet these circuits do not have the authority to depart wilfully from the plain meaning of a statute that is clear on its face. The ADA explicitly lists within its definition of disability "a physical or mental impairment that substantially limits one or more of the major life activities of such individual,"[77] as well as "*being regarded as having such an impairment.*"[78] The statute continues by providing that "[n]o covered entity shall discriminate against a qualified individual with a *disability* because of the disability of such individual . . . ."[79]

Congress unambiguously stated what it meant by "disability" when it referred to a "qualified individual with a disability."[80] It provided a definition of "disability" at the beginning of the

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[74] *Id.* at 1240.

[75] *See id.* at 1222–24.

[76] *Weber*, 186 F.3d at 916–17; Kaplan v. N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003) ("[O]n its face, the ADA's definition of 'qualified individual with a disability' does not differentiate between the three alternative prongs of the 'disability' definition.").

[77] 42 U.S.C. § 12102(2)(A) (2000).

[78] *Id.* § 12102(2)(C) (emphasis added).

[79] *Id.* § 12112(a) (emphasis added).

[80] *Id.*

statute to be applied whenever the term appeared in subsequent sections.[81] The judiciary lacks the unilateral authority to refuse application of a statutory definition simply because it feels that such application may lead to "bizarre results."[82] The ADA unmistakably classifies employees who are "regarded as" disabled as having a "disability."[83] Accordingly, courts must uniformly apply this definition throughout the statute, rather than exceed their grant of authority by arbitrarily excising portions of the statutory definition.

The Eleventh Circuit, like the Third Circuit, appropriately chose not to deviate from the explicit text of the ADA. This conclusion furthers the statutory goal of ending discriminatory practices in the workplace.[84] An employer that regards an employee as being disabled—and that terminates the employee based on his perceived disability—has engaged in a discriminatory practice. Drafting the statute to protect employees discriminated against under such circumstances clearly comports with the the law's purpose. An employer that terminates an employee because he has a disability acts with discriminatory intent. The courts' failure to reprimand employers that terminate employees "regarded as" disabled justifies their discriminatory intent, impliedly encouraging the continuation of this behavior. The only logical way to eliminate this problem is to include "regarded as" disabled plaintiffs within the scope of the ADA's protection. This is particularly appropriate because an employer's intent is discriminatory regardless of whether the employee is disabled in the actual impairment sense, or is merely regarded as disabled.[85] Failing to

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[81] *See id.* § 12102(2).

[82] Weber v. Strippit, Inc., 186 F.3d 907, 916 (8th Cir. 1999).

[83] *See* 42 U.S.C. § 12102(2)(C).

[84] *See supra* note 29 and accompanying text.

[85] *See* Michael D. Moberly, *Letting Katz out of the Bag: The Employer's Duty to Accommodate Perceived Disabilities*, 30 ARIZ. ST. L.J. 603, 640–41 (1998). In discussing the reasons for including "regarded as" disabled persons as part of the statutorily protected class, the author reviewed one court's finding that:

> The purpose of the act is to prohibit employers from discriminating on the basis of handicap. It would not be consistent with that purpose to relieve employers who so discriminate of liability if, although they acted in a prohibited discriminatory manner, it later turns out that their belief was in fact erroneous. The key as far as the act is concerned is that the employer acted on the belief of a handicap.

Id. (quoting Sanchez v. Lagoudakis, 486 N.W.2d 657, 660 n.16 (Mich. 1992)).

hold employers liable for discriminating against an individual who—for all they know—may actually be disabled, detracts from the legislature's intent to eliminate workplace discrimination.[86] Furthermore, providing such protection for "regarded as" disabled employees prevents the danger of leaving certain classes of impairments—i.e., those that fail to rise to the level of "actual impairment" under the ADA—without an adequate remedy at law.

Interpreting the ADA so as to exclude "regarded as" disabled plaintiffs from its protection creates many disadvantages for employees with less visible impairments, such as mental illness or vertigo.[87] While an employer may be fully aware of his employee's impairment, an employee with a mental illness may fail to meet the evidentiary requirements to fall within the actual impairment definition of disability established by the ADA.[88] Employees with mental illness or vertigo often lack outward signs of disability that are observable to a third party, making it much more difficult to prove that they are actually impaired. Employees with such a condition who have been unjustly discriminated against must rely on the "regarded as" definition of disability to ensure their right to receive reasonable accommodations under the ADA.[89] Sadly, the statutory interpretation of the Fifth, Sixth, Eighth, and Ninth Circuits leaves such employees outside of the ADA's protective umbrella, and without the means to assert an effective claim of discrimination.

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[86] *See* 42 U.S.C. § 12101(b)(1) (listing as the first purpose of the Act, "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"); McFarlin, *supra* note 4, at 964 (maintaining that a failure to hold employers that refuse to interact with an employee who is regarded as disabled "pulls the teeth from the ADA's express, and paramount, antidiscrimination function").

[87] *See* Reisman, *supra* note 31, at 2129 (asserting that if a court narrowly constructs the ADA's "regarded as" disabled prong, a plaintiff with less visible impairments will have much more difficulty in successfully asserting an ADA claim).

[88] *See id.* at 2127 (pointing out that employees with less visible impairments may have difficulty demonstrating that they fall within the statute's "actual impairment" definition of disability).

[89] *See id.*

B. *A Communication Breakdown Between Employee and Employer as to Whether the Employee Could Perform "Essential Functions"*

The Eleventh Circuit correctly reversed summary judgment for ConAgra on the issue of whether the plaintiff could perform the essential functions of her job.[90] The district court found that the plaintiff was not a qualified individual under the ADA, "since working on a conveyor belt was an essential function of her . . . position[] which she was unable to perform even with a reasonable accommodation."[91] This conclusion is at odds with the facts of the case, given that working on the spreader belt was only one small component of her job as a product transporter.[92] The plaintiff only experienced sickness and dizziness while continuously staring at the spreader belt, and there were numerous other duties that she could perform as a product transporter that did not trigger any of her vertigo symptoms.[93] Additionally, since the plaintiff was well qualified to work at a number of additional positions, she could have been "reasonably accommodated" by switching to one such position. An employee willing to be transferred to another position in which she is also qualified should not be barred from receiving protection under the ADA because a court concludes that she cannot be reasonably accommodated in one specific position. Rather than hastily making the decision to fire the plaintiff from the plant, it would have been far more prudent—and lawful—for ConAgra to discuss with her any reasonable means of accommodation.

The dissent in *D'Angelo* agreed that this case exemplified a failure in communication.[94] The employer did not gain a clear understanding of the employee's vertigo condition, nor did it inquire as to precisely which functions the employee could and

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[90] D'Angelo v. Conagra Foods, Inc., 422 F.3d 1220, 1240 (11th Cir. 2005).

[91] *Id.* at 1229–30.

[92] *See id.* at 1222. Her additional duties as product transporter included stacking, pulling pallets with a jack, packing, weighing the product, ensuring that fish traveling down a chute did not clog a machine, and any other duty assigned to her by the "line leader." *Id.*

[93] Each job at ConAgra was classified at a certain level ranging from I to V, and all employees were considered qualified to work at any position at or below the level of their current position. *Id.* The plaintiff was a product transporter, which was a level III position. *Id.* Working over the spreader belt was the only task related to her product transporter position about which the plaintiff complained. *See id.* at 1223.

[94] *Id.* at 1240 (Fay, J., dissenting) (classifying the situation as a "failure to communicate case").

could not perform.[95] It would be unjust to punish the employee on account of the employer's failure to inform itself sufficiently of the facts. Public policy should encourage the employer to communicate with the employee in order to seek an adequate alternative working situation, so as to avoid an onset of those symptoms incidental to the employee's impairment.

The circuit court properly determined that continuous staring at a conveyor belt may not be an essential function of the plaintiff's job.[96] There were a number of alternative positions and tasks that she could have performed, and that did not trigger sickness or dizziness.[97] This should have been readily apparent to ConAgra given that that the plaintiff made it expressly known to the company,[98] and ConAgra should have accommodated her by removing the plaintiff from the conveyor belt.

III. THE "SUBSTANTIALLY LIMITED" TEST SEVERELY HINDERS A PLAINTIFF SEEKING ADA PROTECTION

In the first prong of its three-part definition, the ADA defines a disability as "a physical or mental impairment that *substantially limits* one or more of the major life activities of such individual."[99] In order to have a viable claim under this prong, a plaintiff therefore must be able to show that his impairment substantially limits one or more of his major life activities.[100] Major life activities are those of "central importance to daily life,"[101] and courts have consistently treated working as

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[95] *See id.*

[96] *See id.* at 1234 (majority opinion).

[97] *See supra* notes 92–93 and accompanying text.

[98] *See supra* notes 12–14 and accompanying text.

[99] 42 U.S.C. § 12102(2)(A) (2000) (emphasis supplied).

[100] *See* Sullivan v. Neiman Marcus Group, Inc., 358 F.3d 110, 114–15 (1st Cir. 2004) (affirming summary judgment for the employer because the plaintiff failed to show that his alcoholism substantially limited him in the major life activity of working); *see also* Toyota Motor Mfg., Kentucky v. Williams, 534 U.S 184, 195 (2002) (stating that, in order for a plaintiff to qualify as "disabled," he or she must show that the limitation on a major life activity is "substantial"). The Court also noted that the Equal Employment Opportunity Commission ("EEOC") regulations "instruct that the following factors should be considered [in determining whether an individual is substantially limited in a major life activity]: '[t]he nature and severity of the impairment; [t]he duration or expected duration of the impairment; and [t]he permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment.'" *Id.* at 196.

[101] *Williams*, 534 U.S. at 197.

constituting a major life activity.[102] The plaintiff in *D'Angelo* claimed that her vertigo condition caused her to be substantially limited in her ability to work.[103] The Eleventh Circuit, however, rejected the claim and found that the plaintiff had not shown that a genuine issue of material fact existed as to whether she was substantially limited in her ability to work.[104]

The Eleventh Circuit adopted the test set forth in *Sutton v. United Air Lines, Inc.*,[105] which established that "[w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs."[106] This test is consistent with the Equal Employment Opportunity Commission's ("EEOC") interpretation of the ADA, which posits that an individual's ability to work is "substantially limited" when the individual is

> significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.[107]

Due to the fact that the plaintiff only claimed that she was limited in her abilities to perform her duties at the product transporter position, the Eleventh Circuit upheld summary judgment for ConAgra on this issue.[108] This holding revealed the challenges a plaintiff faces when attempting to assert this prong of the ADA's disability definition. The *Sutton* test[109]—requiring plaintiffs to show that they are unable to work in a broad class of jobs—removes a large number of plaintiffs from the statute's protection who otherwise could show that, based on their disability, they were unjustly discriminated against by their employer.

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[102] *See, e.g.*, Carruthers v. BSA Adver., Inc., 357 F.3d 1213, 1216 (11th Cir. 2004) (citing EEOC regulations).

[103] *See* D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1226 (11th Cir. 2005).

[104] *Id.* at 1227.

[105] 527 U.S. 471 (1999).

[106] *Id.* at 491.

[107] 29 C.F.R. § 1630.2(j)(3)(i) (2006).

[108] *D'Angelo*, 422 F.3d at 1227.

[109] *See supra* notes 105–06 and accompanying text.

In *D'Angelo*, the plaintiff was terminated on account of her bouts of sickness and dizziness associated with vertigo.[110] The acts of ConAgra were facially discriminatory, but, instead of requiring ConAgra to make simple adjustments to the plaintiff's duties—namely, switch her to another position or simply remove her from the conveyor belt—it was allowed to terminate her employment altogether. An interpretation of the statute that permits such a result severely undermines the purpose behind the ADA.[111] Under this reading, an employer is permitted to terminate an employee even though the effects of his impairment could be easily accommodated.

A major problem with requiring plaintiffs to show that they are unable to work in a broad class of jobs is that an extremely high evidentiary burden is placed on those who suffer from less visible impairments.[112] In the absence of a clear and obvious physical limitation, it is quite difficult for plaintiffs to show that they would be unable to perform adequately their duties in a broad class of jobs. The overall effectiveness of the ADA is thus greatly diminished, and the statute is rendered exceedingly employer-friendly.[113] As stated above, the ADA effectively fosters the continued use of discriminatory employment practices in situations where the employer is aware that an employee is impaired, and yet could be reasonably accommodated in a way that imposes minimal hardship on the employer.[114] In such circumstances, the employer can dismiss

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[110] *D'Angelo*, 422 F.3d at 1223–24.

[111] The purpose of the Act was to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) (2000).

[112] *See* Reisman, *supra* note 31, at 2154; *see also* Kay Schriner & Richard K. Scotch, *The ADA and the Meaning of Disability*, *in* BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS 164, 173 (Linda Hamilton Krieger ed., 2003) (indicating that plaintiffs are frequently denied protection under the ADA because they are unable to show that they are restricted in their ability to perform a "whole class of jobs, not just the specific job at issue") (emphasis omitted).

[113] *See* Hoffman, *supra* note 5, at 1215–16 (observing how the actual implementation of the ADA has resulted in a low success rate for plaintiffs).

[114] The ADA states:

> [T]he term 'discriminate' includes . . . not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a

the employee without repercussion, leaving the employee without an effective remedy at law.[115]

IV. A PLAINTIFF SEEKING PROTECTION UNDER THE ADA SHOULD BE PREPARED TO FACE IMPENDING OBSTACLES AND BARRIERS THAT WILL SIGNIFICANTLY DIMINISH ANY HOPES FOR SUCCESS

In addition to the hardships mentioned in the preceding section, an employee seeking protection under the ADA can expect to encounter other unavoidable setbacks, increasing the likelihood that his ADA-derived employment discrimination claim will be defeated. For example, let us assume that an employee who has been discriminated against by his employer files suit, claiming a violation of the ADA's reasonable accommodation requirement. In order to possess a legitimate claim under the ADA, the employee must be able to show that he was "disabled" within the statutorily prescribed meaning.[116] In

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> disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.

42 U.S.C. § 12112(b)(5)(A)–(B). The statute defines "undue hardship" as "an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B)." *Id.* § 12111(10)(A). Subparagraph (B) of that section states:

> In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—
> (i) the nature and cost of the accommodation needed under this chapter;
> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Id. § 12111(10)(B).

[115] The statute lists as one of its findings that "unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination." *Id.* § 12101(a)(4).

[116] *See* McFarlin, *supra* note 4, at 937 (stressing that in order to bring a suit under the ADA, an individual must first fall within the statute's definition of "disability").

attempting to make this showing, the employee claims that he was disabled both in the sense that he had a physical (or mental) impairment that substantially limited him in the major life activity of working, and that he was regarded as having such an impairment by his employer.[117] In order then to prove that he suffered from an actual physical impairment that substantially limited his ability to work, the employee must show that he is "*unable to work* in a broad class of jobs."[118] Assume that the employee offers evidence in support of this assertion, and the court accepts his contention that he is substantially limited in his ability to work. The next step in the inquiry is to determine whether the employee is a qualified individual within the meaning of the ADA.[119]

A qualified individual with a disability means "an individual with a disability, who, with or without reasonable accommodation, *can perform the essential functions of the employment position* that such individual holds or desires."[120] The employee has already offered evidence sufficiently showing that he is unable to work in a broad class of jobs, and is now seemingly required to prove just the opposite—that he *can* perform the duties of his job. Due in part to the evidence already presented by the plaintiff, it has become significantly easier for an employer to rebut successfully any claim by an employee that he is able to perform the duties of his job even with a reasonable accommodation. In the process of strengthening his position as substantially limited in a major life activity, the employee was also removing himself from the ADA's protection by indicating that he was not, in fact, a qualified individual.

The current standard for proving an employment discrimination claim under the ADA thus forces a plaintiff into a Catch-22 situation. On the one hand, the employee must prove that he is impaired to such an extent that he is rendered incapable of performing a broad class of jobs; yet on the other hand, he must demonstrate that he is not disabled to such a degree as to make him unqualified.[121] This is obviously a difficult

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[117] 42 U.S.C. § 12102(2) (setting out the definition of "disabled" under the ADA).

[118] Sutton v. United Air Lines, Inc., 527 U.S. 471, 491 (1999) (emphasis added).

[119] *See* 42 U.S.C. § 12111(8) (defining a "qualified individual" under the ADA).

[120] *Id.* (emphasis added).

[121] Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107, 127 (1997).

dilemma, and it grants the employer an enormous advantage when defending against an ADA claim.[122]

In *Sullivan v. Neiman Marcus Group, Inc.*,[123] the First Circuit recognized the problem created by the current interpretation of the ADA's language, and the significant difficulties that it produces for an ADA claimant.[124] The court observed these statutory shortcomings in stating that "[b]y demonstrating that his ability to work is substantially impaired, he may demonstrate that he is unqualified for the job and, therefore, excluded from ADA protection. If he does not introduce such evidence, however, he may fail to show that he was substantially impaired."[125] A flaw so inherent in the statute's application clearly manifests how an employer is automatically awarded a leg up when defending against an ADA claim.

It is thus not surprising that an employer will use the plaintiff's own evidence against him.[126] Attorneys are even advising employers facing ADA discrimination claims to use such

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[122] An employer may use the current standard to its advantage by arguing that "the plaintiff is not disabled in her ability to work because her impairment does not substantially limit her ability to perform a class of jobs." *Id.* Yet, "if she is disabled, then her impairment is so severely limiting that she is not qualified to perform the essential functions of the job in question." *Id.*

[123] 358 F.3d 110 (1st Cir. 2004).

[124] *See id.* at 115 (acknowledging the difficulties faced by an ADA claimant in bringing an action for discrimination on the basis of disability). The plaintiff in *Sullivan* was terminated from his job and brought a claim of discrimination against his employer, alleging that he had been terminated on account of his alcoholism. *Id.* at 112–14. The court determined that alcoholism was a disability under the definition provided in the ADA, and proceeded to address the plaintiff's claim that alcoholism had substantially impaired him in the major life activity of working. *Id.* at 114–15. The court then raised the Catch-22 issue that the plaintiff would undoubtedly face in seeking ADA protection, but proposed no potential solution. *Id.* at 115–16.

[125] *Id.* at 115. The text of the ADA allows an employer to "hold an employee who . . . is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the . . . alcoholism of such employee." 42 U.S.C. § 12114(c)(4) (2000). The court in *Sullivan* professed that "[t]his statutory provision means that an employee who tries to use deficiencies in his job performance as evidence that alcoholism substantially impairs his ability to work is likely to establish the unhelpful proposition, for ADA coverage, that he cannot meet the legitimate requirements of the job." *Sullivan*, 358 F.3d at 116.

[126] *See* Locke, *supra* note 121, at 127 (stating that employers are more frequently using the dilemma faced by employees to their advantage by arguing—once the employee has established his disability—that the employee is then not a qualified individual with a disability).

evidence in their favor if an employee successfully shows that his impairment or condition renders him unable to perform a class or broad range of jobs.[127] This offers little encouragement to an employee—one fully aware of this Catch-22—to assert an ADA claim despite feeling that he has been wrongfully discriminated against on the basis of a disability.

CONCLUSION

The ADA—as written and as interpreted—has done little to aid in the fight against discrimination in the workforce on the basis of disabilities. In 2003, the success rate for employers faced with an ADA claim was ninety-eight percent.[128] Given this enormously high rate of victory, the statute hardly deters employers from dismissing employees they feel have impairments that may affect their productivity on the job, even if providing reasonable accommodations for such employees would impose minimal hardship. Absent adequate protection from the ADA, many employees wrongfully discriminated against lack the necessary footing upon which to bring a claim against their employer. Such a result is contrary to the ADA's goal of providing the means to protect employees subjected to discrimination, and even fosters the continuation of discriminatory practices. The ADA's broad language compounded by employer-friendly judicial interpretation has taken the bite out of the legislature's promising intentions.

The *D'Angelo* case exposed flaws in the text of the ADA, as well as the problematic judicial interpretation engendered by these flaws. The court correctly answered in the affirmative the question of whether a "regarded as" disabled individual is entitled to reasonable accommodations, but was unable to resolve additional interpretational problems, such as the standards for determining whether a person is "substantially limited in a major life activity," or who comprises a statutorily "qualified" individual. Indeed, the Supreme Court even recognized that there are "conceptual difficulties inherent in the argument that

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[127] *See* Faillace, *supra* note 42, at 1000 (offering a section titled "Practical Recommendations" in which the author provides such advice for employers). Michael Faillace, the Managing Partner of Michael Faillace & Associates, P.C., is a national speaker and writer on issues concerning the ADA. *Id.* at 949.

[128] *See* Allbright, *supra* note 44.

working could be a major life activity" under the ADA.[129] A revised standard is therefore mandated, one that truly provides clarity as to how both employers and employees are to address discrimination issues.

[129] Toyota Motor Mfg., Kentucky v. Williams, 534 U.S 184, 200 (2002).